IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 322 of 1996

with

CRIMINAL APPEAL No 378 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KESHVANAND HARINARAYAN SWAMI@ KAMAL VISHWESHWER SHARMA
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 322 of 1996
MR DAFTARI WITH MR KJ SHETHNA for appellant.
MR BUKHARI, APP, for Respondent No. 1
2. Criminal Appeal No. 378 of 1996
MR BUKHARI, APP, for appellant.
MR RA BHATT for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL
and

MR.JUSTICE A.L.DAVE

Date of decision: 26/06/2001

ORAL JUDGEMENT

(Per A.L. Dave, J.)

1. These two Criminal Appeals arise out of a judgment and order rendered by learned Additional Sessions Judge, Jamnagar, in Sessions Case No.118 of 1994 on March 18, 1996.

2. The facts leading to the present appeals are that, a First Information Report came to be lodged by one Mitesh Manubhai Shah before the Dwarka Police on June 18, 1994 against one Swami Keshvanand and another one Ravindra alias Mama of Sanatan Seva Mandal, an institution working at Dwarka. The charged levelled against the two accused persons were punishable under Sections 376, 354 and 114 of Indian Penal Code.

3. According to the prosecution, sister of the first informant - Rita - was studying in the school run by Sanatan Seva Mandal, at Dwarka. About three months prior to the date on which the F.I.R. was lodged, the girl was called by accused-Ravindra at about 12.00 noon and was taken to the room of accused-Keshvanand. It is the case that Swami Keshvanand initially made indecent advances towards Rita and then, ultimately, committed rape on her. As a result thereof, she had bleeding, she had severe pain and she started crying. She was asked by Keshvanand not to disclose this incident to anybody else. When she came out of the room, the first informant who was sitting outside the room on a water tank saw her crying. He, therefore, inquired of Rita as to why she was crying. He was informed by Rita about the incident that had occurred. The first informant, therefore, went to accused-Keshvanand where he was also threatened not to disclose this fact to anybody else. He, therefore, went away. As per the say of the first informant in the F.I.R., he told his sister Rita not to go to the room of Keshvanand even if she is called again. However, he found that accused-Ravindra used to take Rita to the room of Keshvanand even thereafter and he, therefore, used to keep a watch and when Rita used to come out of the room, he used to inquire from her and was informed about rape being committed on her by Keshvanand on every occasion. According to the first informant, as he could not bear the situation, he left Sanatan Ashram about a month and a half prior to his lodging the F.I.R. He has then stated that, out of fear of Keshvanand, people are not divulging

the correct information, but he is involved in such activities which are known to all.

3.1 On basis of the first information, an offence was registered at C.R.-I No.60 of 1994 with Dwarka Police Station. The case was investigated upon by the police. The victim girl-Rita was subjected to medical examination so also accused-Keshvanand. As per the prosecution case, a statement of Rita under Section 164 of the Code of Criminal Procedure was also got recorded before the Judicial Magistrate. The Investigating Agency having found sufficient evidence against the accused persons, filed a charge sheet before the learned Judicial Magistrate, First Class, Dwarka. Since the charges against the accused persons were triable exclusively by a Court of Sessions, the case was committed to the Court of Sessions at Jamnagar and Sessions Case No.118 of 1994 at Jamnagar was registered. Charges were levelled against the accused persons at Ex.4 for offences punishable under Sections 354, 376(2)(c) read with Section 114 of Indian Penal Code. The accused persons pleaded not guilty to the charges and expressed their desire to face the trial.

4. Considering the evidence led by the prosecution, the learned Additional Sessions Judge came to a conclusion that the prosecution was successful in proving the charges against accused-Keshvanand whereas the learned Trial Judge found that the charges levelled against accused-Ravindra Brahmadev Chowbe were not proved by the prosecution and was, therefore, acquitted of the charges. Accused-Keshvanand was heard on question of punishment and was ordered to undergo rigorous imprisonment for a term of 10 years for the offence punishable under Section 376(2)(c) of Indian Penal Code. He was also directed to pay a fine of Rs.35,000/- and was directed to undergo a further simple imprisonment for a period of two years in event of default in payment of fine. It was also ordered that in event fine is paid, an amount of Rs.25,000/- be paid to the victim girl-Rita, by way of compensation.

5. Aggrieved by the said judgment and order, accused-Keshvanand has preferred Criminal Appeal No.322 of 1996 on various grounds.

5.1 Likewise, aggrieved by the quantum of sentence imposed on accused-Keshvanand, the State has preferred Criminal Appeal No.378 of 1996, praying for enhancement of the sentence.

6. We have heard learned counsel Mr. Shethna and

Mr. Daftari on behalf of the appellant-accused-Keshvanand and Mr. Bukhari, learned Additional Public Prosecutor, on behalf of the State. We have been taken through the records and proceedings and the evidence thoroughly.

7. We shall first deal with the appeal preferred by the convict. The main contentions raised on behalf of the accused-appellant can be stated thus :-

(1) It has been contented that the judgment and order convicting accused-Keshvanand is unsustainable as it is founded on erroneous evaluation of evidence. The learned Trial Judge has not taken into consideration various flaws in the prosecution case. It was contended that the evidence of the prosecutrix is inconsistent with the prosecution story. The improvements made in the deposition by the prosecutrix, though appear to be innocuous, are made with a design to derive support from medical evidence. It is also contended that in light of the medical evidence, the girl could not have been subjected to even a single act of coitus. The medical examination of the accused also indicates that the act indicated by the prosecution was not possible. The whole investigation is indicated to be lopsided and lacks in fairness and impartiality. It has come in evidence that the prosecutrix was made to give certain statements putting pressure on her maternal uncle and even on herself by authorities for which a petition was filed before the High Court. It is also contended that the conduct of the prosecutrix and the first informant, the brother of the prosecutrix, is such that it ought not to have been accepted by the Court below. Even after three months of the incident, neither the prosecutrix nor her brother who is in know of the incident has ever tried to disclose this fact to anyone nor an F.I.R. is lodged in this regard. This F.I.R. is lodged on being approached by the Police. The first informant had come to know about certain complaints having been lodged against Keshvanand of similar nature. In spite of that, he does not come forward to lodge the complaint, but he lodges the complaint only on being approached by the Police.

(2) The medical evidence rules out the possibility of a sexual intercourse with the prosecutrix. The case of the prosecutrix is that rape was committed on her on number of occasions. But

later when she enters the box, having found that the medical evidence is not likely to corroborate her say of repeated rapes, she changes her version to indicate that she was raped only once. This change in the version is designed only to derive support from the medical evidence or to lend support to the medical evidence. All these factors taken collectively, the accused could not have been convicted.

(3) The prosecution version, initially, is that accused No.2 had taken the girl to the room of accused No.1 on the first occasion, where she was ravished. But in the deposition, no allegation is made against accused No.2-Ravindra and it is indicated that she was taken by one Hemaben, who has not been examined nor is she arraigned as an accused. As per the deposition of the complainant, the girl was being taken to the room by accused-Keshvanand himself.

(4) As per the prosecution case, the Investigating Agency got statement of the prosecutrix recorded by Judicial Magistrate, as provided under Section 164 of the Code of Criminal Procedure. This aspect is flatly denied by the prosecutrix in her deposition. The prosecution has not examined the Magistrate who recorded the statement and the statement has not been proved and not placed on record by the prosecution.

(5) It was urged on behalf of the accused-appellant that, if these factors are taken into consideration, the case against the accused ought not to have been accepted and the conviction could not have been recorded. The Trial Court having run into error of convicting the accused-appellant, the appeal may be allowed and the said judgment and order may be set aside.

7. Countering the contentions raised by the accused-appellant, the respondent-State, represented by learned Additional Public Prosecutor Mr. Bukhari, has contended that the prosecutrix is a young girl. She was under influence of accused No.1 as she was studying in the school. Her brother is also a young boy of Nineteen. He was also under the influence of accused-Keshvanand and, therefore, neither the girl nor her brother could have offered any resistance nor could they come out of the intimidation administered by accused No.1-Keshvanand and lodge a complaint/F.I.R. Keshvanand, under the garb

of a Saint and caretaker of the Ashram, has misused his position of loco-parentice and, therefore, he is rightly convicted, but the sentence inflicted on him is less. He ought to have been sentenced for life imprisonment.

7.1 It is contended by learned Additional Public Prosecutor that certain contradictions, omissions or loopholes are bound to creep into the prosecution evidence, particularly, when evidence is recorded after a lapse of time and the evidence is given by young witnesses. There was no reason for the prosecutrix to falsely implicate the accused. No girl would falsely implicate a man for offence of a nature which is likely to tarnish her own image. The medical evidence relating to the accused-Keshvanand indicates that he was not incapable of committing an intercourse. Likewise, the medical evidence indicates that possibility of rape on the victim cannot be ruled out and, therefore, the Trial Court has rightly convicted the accused.

8. Before we proceed to deal with the merits of the case, it would be relevant to record here that we are informed by learned counsel for the accused-appellant that the accused has been released from jail on completion of the term of sentence, in light of the remission given to him. We are also informed that the accused has paid the fine.

9. In order that the contentions raised before us are properly appreciated, it would be appropriate to have a look at the law, as settled by various pronouncements.

9.1 In Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, AIR 1983 SC 753, relied upon by the State before us, the Apex Court observed that, if the evidence of the victim does not suffer from any basic infirmity and the "probabilities-factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to certain clarifications, namely, corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is likelihood of her having levelled such an accusation on account of the instinct of self-preservation or when the "probabilities-factor" is found to be out of tune.

9.2 In that case, the prosecutrix was sent for medical examination and the medical examination disclosed that there was evidence to show that there had been an

attempt to commit rape on her a few days back. On basis of that evidence, the above observations were made. The Apex Court observed that overmuch importance cannot be attached to minor discrepancies for certain reasons as recorded in paragraph 5 of the said judgment. The High Court, in that case, held that there was an attempt to commit rape on the prosecutrix and the Apex Court found that such conclusion of the High Court could not have been successfully assailed.

9.3 Learned Additional Public Prosecutor, then relied on the case of State of Andhra Pradesh v. Gangula Satya Murthy, 1997 Criminal L.J. 774. In that case, the Apex Court observed that it was the duty of the Court while trying accused of charge of rape to show great sensitivity. The Court should examine broader probabilities and not get swayed by minor contradictions of insignificant discrepancies in the statements of witnesses which are not of vital nature to throw out the allegation of rape. In that case, the medical examination of the prosecutrix indicated fresh tear on vaginal wall. There was an extra-judicial confession of the accused stating that he took the victim by force and kept on the cot as he was long nurturing the lust to enjoy her. In light of these pieces of evidence, conviction was upheld.

9.4 In Harpal Singh v. State of Himachal Pradesh, AIR 1981 SC 361 relied upon by the learned Additional Public Prosecutor, the question before the Apex court was of a different nature. The Apex Court held that the question of consent did not arise as the girl was below the age of 16 years.

9.5 In Kanubhai Shamalbhai Patel v. State of Gujarat, 1990(2) GLH (UJ) 9, a Division Bench of this Court observed that corroboration of evidence of the prosecutrix is not necessary in all rape cases. It is not necessary that in all rape cases, woman would resist sexual intercourse so that she may have some marks of external injury on her person and everything would depend upon beastly physical power of the person who commits rape and the resistance power of the victim and the situation. In that case, the Court found that the conduct of the prosecutrix was natural and there was no material on record to show as to why the prosecutrix would file a false complaint against the accused, if she had willingly accompanied the accused. The Court found her evidence to be reliable and upheld the conviction.

9.6 Learned Additonal Public Prosecutor relied on

Prithi Chand v. State of Himachal Pradesh, AIR 1989 SC 702. The Court observed that the prosecutrix and her parents would not allow the real culprit to escape and falsely involve innocent person in commission of a crime. It was a case wherein there was a delay in lodging the F.I.R. In that case, it was held that in light of the fact that immediately after the incident it was narrated to the mother and other ladies and in light of the fact that a decision was taken to await the return of the father before deciding on the course of action, the delay was justified. That was a case wherein the say of the prosecutrix was corroborated by medical evidence, where there was absence of hymen with edges torn and profuse bleeding. Besides the abovesaid injuries, medical certificate also indicated abrasions on the lumber region, inflammation around the vulva and vaginal bleeding. In light of these facts, the conviction was upheld and appeal was dismissed. It may be noted that in this case, unlike the case before us, opinion of the doctor was not obtained while recording the evidence as to whether the accused could have had vaginal penetration in light of the physical condition of the prosecutrix. In the case before us, the medical evidence is to the effect that even a presumption of penetration is not medically permissible in light of physical condition of the prosecutrix.

9.7 Learned Additional Public Prosecutor then relied on the decision in the case of State of Rajasthan v. N.K., as reported in 2000 SCA (Cri) 898. The Apex Court observed in view of evidence of the prosecutrix that she was forcibly subjected to sexual intercourse should normally be believed unless there is material leading to an inference of her consent. The Court observed that absence of marks of personal injuries on person of the prosecutrix by itself was not sufficient to draw an inference of consent by the prosecutrix and, in facts of the case, the Apex Court held that her testimony that she was subjected to rape was credible. The Court found that, though related witness would not ordinarily subscribe to false story of rape on his daughter and thereby invite ignominy. In that case, medical evidence indicated that the prosecutrix was not used to sexual intercourse. The doctor found that the hymen ruptured in multiple radial tears, the edges of which showed healing on most of the places and mild tenderness. Pieces of broken bangles were found at the place of incident and were seized. Presence of human semen was also found on the lehenga of the prosecutrix. The Court observed that the evidence of the prosecutrix was corroborated by medical evidence as also by the testimony of her father

and, ultimately the decision of the High Court acquitting the accused was held to be erroneous. The appeal of the State was allowed. The judgment of the High Court was set aside and the accused was held guilty of the offence punishable under Section 376 of the Indian Penal Code.

9.8 In State Govt. of NCT of Delhi v. Sunil and Another, 2001 SCC (Cri) 248 relied upon by Mr. Bukhari, learned Additonal Public Prosecutor, it was a case of rape and murder of a girl aged only 4 years. The medical evidence indicated as under :-

"The vaginal orifice is described by the doctor in his report as follows:

Labia majora and minora swollen and reddish blue in colour. Vaginal orifice dilated and blood is coming out of it. Right labia minora showing tears 1.6 x 0.1 cm and on the left side labia minora showing tear in an area of 1.5 x 0.2 cm in vertical plane. Labia majora showing contusion on both sides in an area of 3 x 2 cm each.

About hymen the doctor described thus:

Hymen - showing tear at 5 and 6 o' clock position which was going upto the vaginal wall and triangular in shape in an area of 1.5 x 1 x 1 cm. There were tears on the sides and back of urethra opening upto the hymen in an area of 1.4 x 1.2 cm in triangular fashion.

About the anus the doctor described as follows:

Dilated and blood was coming out of it. The diameter was 1.5 cm. The area around the orifice was showing swelling with reddish contusion in an area of 2 cm.

5. Dr. Basant Lal (PW1) further noted that the vaginal orifice was so badly mutilated that one middle finger could be easily admitted into it."

There was evidence that the girl was taken away from her mother's house and her dead body was found from the house of one of the accused and, on basis of these medical

evidence and other evidence having found to be reliable, the Apex Court accepted the appeal of the State and set aside the acquittal recorded by the High Court convicted the respondents for the offences punishable under Sections 376 and 377 read with Section 34 of I.P.C. as well as Section 304 Part II read with Section 34 of I.P.C.

10. It is, therefore, clear from the various pronouncements that it is not in every case that corroboration to the evidence of the prosecutrix is essential. It would be an insult to her womanhood but rule of prudence requires that, in such cases where the prosecution case hangs on sole testimony of the prosecutrix, her evidence is put to a close scrutiny along with other surrounding material and relevant factors like medical evidence, her conduct, etc. In case of Bharwada Bhiginbhai (supra) the Apex court has also observed that corroborative evidence is not essential every case except medical evidence.

11. We are not oblivious of the fact that lack of education and social circumstances play a major role in such cases and, therefore, the case has to be weighed with such factors in mind. But, at the same time, the cardinal principle of Criminal Jurisprudence "Let a 100 culprit go unpunished but let not an innocent be punished" cannot be overlooked. It would, therefore, be prudent to closely scrutinize the evidence of the prosecutrix as well as the medical evidence which is an indicator of commission or non-commission of offence in such cases.

12. With these legal propositions, if the evidence led by the prosecution is examined, the prosecution has examined the prosecutrix-Rita, at Ex.17. She says that she was formerly studying in the school run by Sanatan Seva Mandal at Dwarka and she was also staying there. Her brother-Mitesh was also studying. Accused-Keshvanand was trustee of Sanatan Seva Mandal and accused Ravindra was also working in the said Sanatan Seva Mandal. According to her, the incident occurred about a year and a half prior to her deposition. In the afternoon, she was called by accused-Keshvanand to his room. Hemaben had come to call her. After Hemaben left, she went to the room of Keshvanand. She was asked by Keshvanand to massage his legs. At that time, there was nobody else in the room except her and Keshvanand. She started massaging his legs. Thereafter, Keshvanand closed the doors of the room and asked her to remove her clothes. She was then wearing a skirt and a bush-shirt and then

Keshvanand did the wrong thing. Because of that, she started bleeding and had pain. She wiped out the blood and then put on her clothes and went out crying. She went to her brother who was sitting on the water tank just outsides the room. When she went to her brother, he asked her to calm down and then she told him what had happened in the room. Her brother, therefore, went to the room of Keshvanand. At that time, she was standing outside the room. Keshvanand was angry with her brother. Therefore, her brother went away. She, however, stayed in the institution. She continued to stay in the institution for about two months even after the incident. Thereafter, she was sent to one Manjuben by accused Ravindra. The police approached her at that place and recorded here statement. She was also taken for medical treatment.

12.1 The girl has been cross-examined, where she states that she had not informed about the rape at the house of Manjuben. She had not lodged any complaint in this regard even after going to Adityana. She was taken from Adityana to Dwarka by police. She was kept at Dwarka for four days. When here statement was recorded, she and the police man recording the statement were alone. Others were sitting outside. She was made to stay in a room in a temple. She was accompanied by a lady constable. She was interrogated by police for 3-4 days. She was kept in a room on upper storey. During this time, she had noticed Keshvanand, who was in the police custody on the ground floor. She had also noticed accused-Ravindra and Hemaben. She says that her maternal uncle from Ahmedabad had come whose name she does not know. But she had not told anything to her maternal uncle regarding the incident. She admits that her maternal uncle was beaten by police in her presence. That was done before her statement was recorded. She also admits that her maternal uncle told her that she should give statement as they want, so that he may not be beaten further. She had then told the police that she would say everything but her maternal uncle may not be beaten. She says that she was kept at Dwarka for 5-6 days, during which she was interrogated daily. She was then kept at Stree Vikas Gruh along with Manjuben and Kantaben from where they were taken to the High Court. She admits that she had complained in the High Court that at the Stree Vikas Gruh, Jamnagar, she was pressurized for telling a falsehood. She admits that what was told before the High Court was correct. She clarifies that they were asked to tell falsehood meaning thereby to implicate Swamiji. The pressure was on to say that she was raped by Swamiji. She then admits in

cross-examination that while returning from High Court, she and other two girls had told the Sub-Inspector-N.B. Jadeja that if he threatens them again, they would again complaint to the High Court.

13. Regarding recording of the F.I.R. and her statement, she says that before she arrived at Dwarka, her brother had lodged the F.I.R. He had told her the details of the F.I.R. and the police insisted that she should give her statement to corroborate the F.I.R. She then states that she was raped only once and, thereafter, she has never been ravished.

13.1 As regards her own statement, she says that she has not stated before police that Swami Keshwanand had called to his room 4 to 5 times after the first incident and then raped her by laying her on a mattress. She admits that her statement was read over to her by the police and when it was read over, the statement did contain the above facts. She then states that this sentence was dictated by her brother. When her statement was recorded, her brother was present and that her statement was dictated by her brother only. She states that the fact that she was raped 4-5 times is wrongly given in the statement. She admits that she has stated in her statement that she was called by Ravindra known as Mama and was taken to the room of Swami Keshvanand. She says that she was never taken to the room of Keshvanand by Hemaben. She states that she had not raised any shouts nor had she resisted Swamiji at the time of the incident. In pararaph 26 of her deposition, she states that Collector Ramanprakash and office bearers of Jamnagar Vikas Gruh were threatening her to depose in a particular manner. She states that her statement was recorded and she was made to sign. The questions were put by police. She was not explained anything by a Magistrate, as she was not at all taken to a Magistrate.

13.2 She says that she had written letters to Hemaben from Jamnagar Vikas Gruh that she had harassment over there. She denies that she had written letter to the effect that they wanted her to depose against Swamiji. She then proceeds to state that she was brought to Jamnagar by the Wadhwan Police 20 days prior to her deposition in the Court and is staying in Kasturba Sanstha.

14. Another material evidence is that of the first informant-Mitesh Manubhai Shah (Ex.18), who happens to be brother of the prosecutrix. In his deposition, he says that the incident occurred about a year and a half or two

years prior to his deposition. He was sitting on a water tank near the room of Swamiji. At that time, his sister came crying to him. She came out of Swamiji's room crying. He, therefore, soothed her and inquired as to why she was crying. She told him that Swamiji took her to his room for massaging his legs and then he ravished her. He, therefore, went to Swamiji and asked him as to why he had done so. Swamiji threatened him and told him not to tell this to anyone. Therefore, he did not tell anyone about this incident, but kept his sister in the institution itself. He says that after the activities of Swamiji were known to people, police came to Maruti Hotel, where he gave his complaint.

14.1 He has been subjected to cross-examination and he says that when police came, he lodged the complaint. Before that, he had no desire to lodge a complaint. He says that, in his complaint, he has stated that Swamiji was committing rape for four to five times. That his sister used to go to Swamiji's room even after the first incident. After the first incident, he had gone once to see her, but his sister told him on several occasions that Swamiji had committed rape on her. He states that his sister had told him that the rape lasted for half an hour. He admits that in the F.I.R. he has not stated that he used to inquire from his sister and his sister used to tell him on various occasions that Swamiji used to rape her. The F.I.R. is produced at Ex.19.

15. The prosecution has examined Dr. Abhey Mehta (Ex.34), who had clinically examined the prosecutrix-Rita. He says that, on being asked, the prosecutrix gave a history of sexual assault by Swami Keshvanand of Sanatan Seva Mandal of Dwarka. He says that, she had stated that there was no violence, injury or unconsciousness or medication. He says that he had examined her clinically in presence of a lady doctor. The patient was found to be conscious. The secondary sexual organs were well developed. No external marks of injury were found on her person. There was no external marks of injury on genitals or inner portion of thighs. The vagina did not admit one finger easily. The hymen was intact and soft. The uterus was retroverted, small in size, firm and mobile. The doctor states that from the medical examination and the history given by the patient, he was not in a position to opine about sexual intercourse with the prosecutrix. He states that there could be partial intercourse where penetration of penis does not reach hymen. He calls it a vulval intercourse. He says that in case of prosecutrix Rita, there is negligible possibility of vaginal intercourse. He says

that considering the history given by the patient, partial intercourse cannot be denied. He says that, if there is any superficial injury on hymen in a partial intercourse, it would heal within 7 to 10 days and if there is bleeding and superficial injuries, it would also heal within 7 to 10 days.

15.1 The cross-examination of the doctor is of vital importance. He says that, while giving the history about the intercourse, the patient had given the history that she had not sustained any injury at that time. If the hymen is intact, it can be said that the girl is virgin and that there was no penetration of male organ. Even if the hymen is intact, if there is intercourse, two fingers would introduce into the vagina easily, but if the hymen is intact and even one finger does not introduce easily, the possibility of intercourse can be ruled out. The doctor says that the patient had given history of an intercourse in about a years time prior to the examination. He agrees that in the present case, the hymen was intact and one finger did not introduce easily in vagina and, therefore, in his opinion, if what was stated by the patient is not given importance, medical possibility of physical intercourse is almost nil. The doctor's attention was drawn to the 20th Edition of the book on Medical Jurisprudence by Dr. Modi, particularly to page 337, paragraph 4, wherein it is stated thus:-

> "In cases where the hymen is intact and not lacerated, it is absolutely necessary to note the distensibility of the vaginal orifice in the number of fingers passing into vagina without any difficulty. The possibility of sexual intercourse having taken place without rupturing the hymen may be inferred, if the vaginal orifice is big enough to admit easily the passage of two fingers."

The doctor has then given an opinion that, according to medical science, if the hymen is intact and one finger does not introduce easily, the presumption of physical intercourse is not permissible. For partial intercourse, introduceablity of finger in the vaginal orifice is important factor. When hymen is intact, passage of finger is important to ascertain whether intercourse is partial or full.

16. We have, thus, before us the evidence of the prosecutrix, the first informant and the doctor. If these three pieces of evidence are seen collectively, what emerges is that, according to the first informant,

the girl was subjected to rape four or five times. This was the version given by the prosecutrix herself in her statement before the police. But when she deposes before the Court, she speaks of rape being committed only once. Against this, if medical evidence is seen, the hymen is found to be intact, vaginal orifice does not introduce one finger easily and the opinion of the doctor is that presumption of intercourse is not permissible medically in such eventuality. There were no marks of any injury nor was there any history of injury given by the patient to the doctor. In our opinion, the medical evidence, therefore, does not lend any support to the say of the prosecutrix or the first informant about the commission of physical intercourse, leave aside a rape or a rape by the accused. We, therefore, have only the version of the prosecutrix about the rape having been committed by the accused appellant, which will have to be closely scrutinized before being accepted.

17. It has to be noted that the prosecutrix has changed her version about the manner in which the incident occurred. Firstly, she says that she was called by accused No.2. Then, as per the say of the first informant, she had told the first informant that Swamiji used to call her and then when she comes to the Court, she says that she was asked to go to Swamiji's room by Hemaben.

18. About the actual occurrence, she says that she was raped by Swamiji and soon thereafter, she informed her brother. About subsequent rapes, in her statement before the police, she speaks of rapes having been committed four to five times subsequently by accused No.1. But then in cross-examination, she says that this part of the statement was introduced by her brother. She even goes to the extent of saying that her whole statement was dictated by her brother. She says that she was ravished only once. Even possibility or presumption of one intercourse is negatived by medical evidence, which fact not only cannot be overlooked but has to be given due weightage.

19. Apart from the above aspect, it has to be kept in mind that neither the prosecutrix nor the first informant take any action in respect of the incident till the first informant is approached by police after a lapse of about three months. Both the prosecutrix and her brother had opportunity of divulging this fact to others at least after they left the institution. Assuming that the were under influence of Swamiji when the girl was in the institution, but thereafter there was no reason for

either the girl or her brother either not to complaint or not to divulge these facts to others. This conduct coupled with the above circumstances makes the deposition of the prosecutrix as well as her brother doubtful.

20. At this stage, it would also be important to note that the investigation is not beyond the shadow of doubt. The prosecutrix has admitted that her maternal uncle was badly beaten in her presence. Her uncle asked her to give the statement as the authorities suggested so that he would save himself from being beaten and she told the police authorities that she would give the statement as desired. It also emerges from deposition of the prosecutrix that while she was kept in Nari Gruh at Jamnagar, she was ill-treated and was forced to give statement against accused-appellant-Swami Keshvanand. This fact is admitted by the prosecutrix in her deposition.

20.1 The prosecutrix admits that she was taken to Dwarka and was kept in the police station for 6 days and during this period the Collector as well as the D.S.P. used to come there. She says that her maternal uncle was being beaten in presence of these officers and, therefore, her maternal uncle used to tell her to give statement as these people desire, so that he may not beaten.

20.2 It also requires to be noted that she stated that after she was brought from Aditayana to Dwarka, she was constantly put under pressure to give her statement in a particular manner and that pressure is of the nature of a threat. Such threats are being administered by the Collector and Officers of Jamnagar Vikas Gruh. She says that she has not moved out of the institution after 6.00 P.M., the previous day. She denies to have made any statement before the Judicial Magistrate which, in fact, has been recorded by Judicial Magistrate. Even the Investigating Officer deposes to this effect and the statement is produced at Mark "A". In any case, the fact remains that her statement has been recorded by a Judicial Magistrate. The girl, therefore, goes to the length of denying her statement before a judicial officer which renders her deposition doubtful and untrustworthy.

21. This conclusion of ours directly reflects from the fact that the prosecutrix in her deposition says that her signature was obtained in Collector office about 3-4 days prior thereto. That was not permitted to be read by her. Only her signature was taken. She was questioned about the present incident and she is deposing before the

Court in the manner in which she was questioned at that time about the case.

22. The above aspects of the prosecution evidence would lead to the only and only conclusion that the prosecution story deserves no credence.

23. Apart from the above defects in the evidence of the prosecution, we find that the investigation lacking in impartiality and independence. In this regard, we may now examine certain material aspects that emerge from the evidence on record. The evidence of the prosecutrix, if seen, indicates that after she was taken from Adityana to Dwarka, she was kept in the Police Station for a number of days. During this period, it was noticed that the Collector had come to the Police Station. It was also noticed that Senior Police officials were also found to be visiting the Police Station. It has come on record that she was put under pressure to give statement as desired by the Investigating Agency (implicating the accused-appellant) and for exerting this pressure, maternal uncle of the prosecutrix was beaten by the police. The prosecutrix was put under psychological pressure while she was at the Nari Gruh, Jamnagar and she was even required to bring this fact to the notice of the High Court. Even thereafter, she was put, so much, under pressure that while returning from the High Court, at Limdi, she told the Police Officer that she would be required to report again this aspect to the High Court. These aspects reflect very badly on the independence, impartiality and credibility of the Investigation.

24. It is also a question that has remained unanswered as to how the police came to know about the first informant and contacted him in absence of any information having been divulged either by him or by the prosecutrix herself. As per the say of the first informant, it is only when the police contacted the first informant at the hotel that he lodged the F.I.R. It has not come on record as to how the police contacted and on what information. The initiation of the investigation, therefore, itself is under a could of doubt. Against the version of the first informant, the officer who recorded the F.I.R., namely, Hareshkumar Ghanshyamsinh Parmar (Ex.36) comes out with a different story. According to him, the first informant-Mitesh Manubhai Shah came to the Police Station at about 7.30 to 8.00 P.M. June 18, 1994 and lodged the F.I.R. (Ex.19), on basis of which he registered the offence and proceeded with the inquiry.

25. As regards recording of the statement of the prosecutrix under Section 164 of Code of Criminal Procedure, the deposition of P.S.I.-Hareshkumar G. Parmar (Ex.36) becomes important, in light of the fact that the prosecutrix has denied the fact of she having been taken before a Magistrate and she having given a statement before the Magistrate under Section 164 of the Code of Criminal Procedure. The case of the prosecution is that, in fact, she was taken before Judicial Magistrate and her statement was recorded. In this backdrop, if deposition of this witness-P.S.I. Hareshkumar G. Parmar is seen, in paragraph 17, he says that from 5.00 P.M. on 18th to 21st, till the prosecutrix was sent to Jamnagar Vikas Gruh, the prosecutrix was under his custody with a lady constable except for the time during which she was subjected to medical examination. Further, in the cross-examination, at paragraph 22, he says that on the 19th, the girl was sent before a Magistrate in the afternoon for giving statement under Section 164 of Code of Criminal Procedure and she came back after 2 hours. He says that the prosecutrix was taken before the Magistrate by the lady constable and neither him nor the A.S.P. accompanied the girl.

25.1 The statement before the Magistrate is at Mark "A". The Magistrate before whom the statement is said to have been made has not been examined and the statement is as such not brought on record as duly proved. The ultimate result is that, as per the prosecution case, statement of the prosecutrix under Section 164 of Code of Criminal Procedure was recorded, but the prosecutrix herself denies to have given such statement. The Police Officer gives doubtful versions. On the one hand he says that the girl was under his custody from 18th to 21st and, on the other hand, he says that, on the 19th, the girl was sent before Magistrate for recording of the statement and that the girl was away for two hours from his custody. All these aspects lead to a situation which would expose the investigation to attack of unreliability.

26. The sum total of the above discussion is that the evidence led by the prosecution is self-contradictory and does not lead to the guilt of the accused without a shadow of doubt. In view of the fact that for about three months neither the prosecutrix nor her brother took any action regarding the incident and in view of the medical evidence ruling out possibility of any vaginal penetration, the say of the prosecutrix and the first informant become vulnerable to doubt. Added to this are

the aspects which reflect badly on the quality of investigation and, therefore, in our opinion, the appellant-convict could not be and could not have been convicted. The Trial Court, therefore, in our opinion, committed an error while appreciating the prosecution evidence and recording conviction of the appellant.

26.1 Criminal Appeal No.322 of 1996, therefore, deserves to be allowed and the same is allowed. The judgment and order of conviction and sentence recorded by the learned Additional Sessions Judge, Jamnagar, in Sessions Case No.118 of 1994 on the 18th March, 1996 is hereby set aside and the appellant-accused-Swami Keshvanand is hereby acquitted of the charges levelled against him punishable under Section 376(2)(c), 354 and 114 of I.P.C. The fine that is paid by the appellant-convict be refunded.

26.2 Criminal Appeal No.378 of 1996 filed by the State is hereby dismissed.

[B.C. PATEL, J.]

[A.L. DAVE, J.]

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